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School of Diplomacy and International Relations

Fall 2017

International Criminal Law

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INTERNATIONAL CRIMINAL LAW

DIPL 4198

Professor Miller

Fall 2017

COURSE DESCRIPTION

Since the end of the Cold War, there has been a rapid and unprecedented expansion in law, institutions, and policy regarding atrocity crimes such as genocide and crimes against humanity as well as abuses committed during war. International criminal law (ICL) has become a well-known, well-funded, and controversial enterprise of its own, along with the related field of transitional justice. ICL appears in both domestic and international courts and comes up frequently in the news, whether in relation to unresolved conflicts such as Syria, open cases like the indictment of Sudanese President Bashir, or as a factor in national politics. The growth and prominence of the field has also provoked questions, including whether international criminal law can deliver on the promises it makes for justice, progress, reconciliation, peace, and reparation. This course will examine the history, theory, and practice of international criminal law. Much of what we do will involve studying the doctrines of international criminal law: who can be held accountable for what actions and under which circumstances? In addition to these types of questions, we will be delving into the politics and policy of international criminal law. Is more international criminal law always a good thing? Is the ICC a neutral institution or is it irreparably biased? How effective and legitimate is international criminal law? How does international criminal law fit into the global legal order?

By reading and discussing case law and scholarly commentary as well as engaging in debates in class, students will also develop familiarity with legal reasoning and analysis. Law is, centrally, about making arguments; in reading and analyzing a wide variety of international legal cases, issues, and doctrines, students will become skilled at identifying, critiquing, and developing legal arguments. The course will also help students to develop critical reading and writing faculties that extend beyond the legal field. We will pay special attention to the intersections between international law and politics and to the relationship between law and justice.

COURSE REQUIREMENTS

This course has several components, more fully described below. **Class participation will be 25% of your grade, response papers will be worth 35% and the final take-home exam will comprise 40% of your grade.**

Readings and Participation. Class attendance and participation are a required part of the course, and will be constitute a quarter of your semester's grade. I expect you to read all of the assigned readings before class and to be prepared to discuss them in class. We will incorporate some in-class exercises as we go; your grade will be judged in part on your active participation in those debates as well as in regular class discussion.

Response Papers. Over the course of the semester, I will give you prompts for response papers of 500-750 words. I will hand out guidelines for these papers separately. These papers are meant to help you think through some of the important issues being raised by the readings.

Take-Home Exam. There will be a final, cumulative take-home exam given out on the last day of class and due during exam period.

PLAGIARISM

Plagiarism and other forms of academic dishonesty will be reported to the administration, and may result in a lowered or failing grade for the course and up to possible dismissal from the School of Diplomacy. See University and School standards for academic conduct here:

<http://www13.shu.edu/offices/student-life/community-standards/upload/Seton-Hall-University-Student-Code-of-Conduct.pdf>

<http://www.shu.edu/academics/diplomacy/academic-conduct.cfm>

In a paper, where you quote language word for word from a source, you must place it in quotation marks or in a block quote and give the exact source for each quoted passage. Where you paraphrase something, you must cite the source. Where you refer to or use an author's insight or idea, you must cite the source. Lifting or paraphrasing language from a web site without indication and citation is plagiarism.

INCLUSIVE LEARNING

It is the policy and practice of Seton Hall University to promote inclusive learning environments. If you have a documented disability you may be eligible for reasonable accommodations in compliance with University policy, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and/or the New Jersey Law against Discrimination. Please note, students are not permitted to negotiate accommodations directly with professors. To request accommodations or assistance, please self-identify with the Office for Disability Support Services (DSS), Duffy Hall, Room 67 at the beginning of the semester. For more information or to register for services, contact DSS at (973) 313-6003 or by e-mail at DSS@shu.edu.

INCOMPLETES

Incompletes will be given only in exceptional cases for emergencies. Students wishing to request a grade of Incomplete must provide documentation to support the request accompanied by a Course Adjustment Form (available from the Diplomacy Main Office) to the professor *before* the date of the final examination. If the incomplete request is approved, the professor reserves the right to specify the new submission date for all missing coursework. Students who fail to submit the missing course work within this time period will receive a failing grade for all missing coursework and a final grade based on all coursework assigned. Any Incomplete not resolved within one calendar year of receiving the Incomplete or by the time of graduation (whichever comes first) automatically becomes an “FI” (which is equivalent to an F). It is the responsibility of the student to make sure they have completed all course requirements within the timeframe allotted. Please be aware that Incompletes on your transcript will impact financial aid and academic standing.

ELECTRONICS

More than one study has concluded that taking notes by hand rather than by typing improves learning; when you cannot transcribe but rather have to translate class discussion and lecture into hand-written notes, you are far more likely to retain the information in more detail and for longer.¹ The temptation to multitask while you are on a computer will not only reduce your participation but will negatively affect those around you.² While I do not prohibit the use of laptops for notetaking in this class, I encourage you to consider taking notes by hand and either not using your computer or using it only to refer to readings. **All use of electronics for any purpose other than notetaking or referencing readings is prohibited.** If you use your laptop for anything else, you will be subject to discipline, including reduction in grades. If I find laptops to be a consistent distraction in class, I will ban them. Please know that I have absolutely no tolerance for the use (or sight) of mobile phones in the classroom. **If I see your cell phone on your desk or in your hand during class, I will confiscate it for the remainder of class.** If you have an emergency situation that requires you to check your phone or email during class, please let me know before class.

OFFICE HOURS AND CONTACT INFORMATION.

My office hours are Wednesdays 1-3pm and by appointment. Please do not hesitate to come talk to me. My extension is 2461 and my e-mail address is Zinaida.Miller@shu.edu.

COURSE MATERIALS

The required casebook is Beth van Schaack and Ronald Slye, *International Criminal Law and Its Enforcement* (3d ed.) Additional readings will be placed the course Blackboard site and other readings are available online. The reading assignments listed below are subject to modification, so

¹ <http://www.newyorker.com/tech/elements/the-case-for-banning-laptops-in-the-classroom>.

² <http://www.sciencedirect.com/science/article/pii/S0360131512002254#>.

please **check your email regularly**, as I will notify you through email with changes as well as posting on Blackboard.

If you have not taken Public International Law (or are eager for a helpful refresher!), you may find it useful to look over the treatise, *International Law* (7th ed.) by Mark W. Janis or *International Law Frameworks* by David Bederman and Chimène Keitner (4th ed.). You should be familiar with basic nuts and bolts of international law, most importantly with what the sources of international law are and how they work – treaties, customary international law, etc.

I have posted a general introduction to international criminal law by Frédéric Mégret. You may want to look it over for reference from time to time.

If you'd like to keep up with current issues in the fields of international law and international criminal law, some useful websites to consult are

www.opiniojuris.org

<https://justiceinconflict.org/>

<https://ilg2.org/>

***CB= van Schaack and Slye**

Part I. Introductions

Class 1 (August 28)

Introduction to the Course

****Sept 4 NO CLASS LABOR DAY****

Class 2 (Sept 11)

The History and Theory of International Criminal Law

1. What is international criminal law for?

- CB 1-11, 17-25 The Purposes of the Criminal Law (through Note 3)

2. What is transitional justice?

- <https://www.ictj.org/about/transitional-justice>

Blackboard

- “The new landscape of transitional justice” (1-14) in Naomi Roht-Arriaza and Javier Mariezcurrena (eds.) *Transitional justice in the twenty-first century: Beyond truth versus justice*

3. How did we get here?

Blackboard:

- Cryer et al., 109-115 (Nuremberg), 122-143 (ad hoc), 144-154 (ICC), 163-66 (ICC trigger mechanisms – read to the end of 166)
 - *Optional:* Sriram et al., “Yugoslavia” [We will cover a number of cases from the ICTY over the course of the semester, so it may be useful to use this chapter as a reference as we move through the material.]
- Nesiah, “Doing History with Impunity”, in *Anti-Impunity and the Human Rights Agenda*

Questions to Consider

- What are the purposes of criminal law? Do you think there is anything different about international criminal law as opposed to domestic?
- Consider the purposes of transitional justice and international criminal law. Are there conflicts among the different objectives?
- Although we are not reading the book that Nesiah critiques here, by Gary Bass (although I have posted the introduction on Blackboard, if anyone is interested), her critique is more broadly directed at those who celebrate the entire development of international criminal law as a victory for progress and human rights. What is Nesiah’s central argument? Do you find it convincing?

Part II. Procedural Nuts and Bolts: Jurisdiction, Admissibility, and Institutions

Class 3 (September 18)

Jurisdiction

1. Introduction to Jurisdiction
 - CB 31-39
2. Domestic Courts and Universal Jurisdiction
 - CB 53-66 (Arrest Warrant, ICJ)
 - CB 70-73 Notes on Universal Jurisdiction

Blackboard

 - Aljazeera, German Lawyers Seek Criminal Case Against Syria's Assad, <http://www.aljazeera.com/news/2016/11/german-lawyers-seek-criminal-case-syria-assad-161128141943783.html>
3. Jurisdiction of the Ad Hoc Tribunals
 - CB 114-128, through Note 2 (ICTY and *Tadić*)
4. Challenging Jurisdiction: *Nullem Crimen Sine Lege* (no crime without law)
 - CB 991-1006, through Note 6 (SCSL, *Hinga*)

To Consider

- Be prepared to debate whether/to what extent the ICTY and ICTR were legitimate institution. Consider the various facets of legitimacy (moral, legal, political, and sociological). Focus on the arguments in *Tadić*.
- The rule of law is in part based on the idea that you can only be convicted of a crime if your act was a crime at the time it was committed. How does the Special Court grapple with this principle in *Hinga*? Be prepared to articulate the arguments of the judgment and the dissent. Which do you find most persuasive?

Class 4 (September 25)

The Law and Politics of the International Criminal Court

Blackboard

- Rome Statute, Parts I, II, & V, skim rest
- CB 139-156 (Triggers, Complementarity)
- CB 175-76, 188- 198 (Situation in Libya, Admissibility)

The ICC and Africa

Blackboard

- Krever, "Africa in the Dock: On ICC Bias"
- Heller, "Situational Gravity" (excerpt)
- Okafor and Ngwaba, "The ICC as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections", *International Journal of Transitional Justice* (2015)

For Class

- Look at the ICC website to see current situations and cases and look at how each of them have gotten to the Court – were they initiated by the Prosecutor, the Security Council, or a State Party?
- How does the ICC seek to balance between the importance of international courts and the significance of domestic trials? What do you think are the purposes of complementarity and how did they play out in Libya?
- The refrain that the ICC is a neocolonial institution with an inherent bias against Africa has become a familiar part of world politics. What do you think? How do these authors grapple with this question?

Part III: Substantive International Criminal Law

Class 5 (October 2)

Introduction to criminal law

- CB 205-211 (through note 1) (Elements of a crime)

Introduction to International Humanitarian Law

Blackboard

- Sriram et al 54-57

Legal Regulation of Armed Conflict

1. What is an “armed conflict”?

- CB 215- 238 (*Boškoski*, ICTY Trial Chamber 2008)

2. International & Non-International Conflicts

- CB 238-254 (through Note 3)

3. Nexus to Armed Conflict

- CB 262-274 (*Kayishema*, ICTR Trial Chamber, 1999 and Problem)

****October 9 NO CLASS****

Class 6 (October 16)

War Crimes

1. Hague Law: Means and Methods of Warfare

- CB 275-291 (*Martić*, ICTY Appeals 2008, and Notes)
- CB 304-316

2. Geneva Law: Protected Persons and Things

- CB 316-26 (Civilians as Protected Persons *Delalić*)
- CB 334-367 (Combatants as Protected Persons: *Hamdan*)

3. Crime of Aggression

- CB 369-70, 388-418 (Prohibition on use of force contemporary crime of aggression)

Class 7 (October 23)

Crimes Against Humanity

1. Definitions and Elements

- CB 427-37, through Note 2 (Elements, *Kupreškić* ICTY 2000)
- CB 441-459 (Chapeau elements: *Kenyatta et al.*, ICC Pre-Trial Chamber)

2. Constitutive Acts: Sexual Violence

- CB 459-475 (Sexual Violence and Forced Marriage)

Blackboard

- Engle, “Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina” (2005), excerpts

3. Constitutive Acts: Persecution

- CB 475-484

Class 8 (October 30)

Genocide

1. Protected Groups: CB 495-511 (*Akayesu*)
2. Specific intent: CB 511-522 (*Jelisić*)
3. In Whole or In Part: CB 549-568 (*Krstić*)
4. Constitutive Acts CB 568-581 (Rape as genocide, Notes)
5. Consider Note 2 CB 588-9

Class 9 (November 6)

Individual Responsibility

Read CB 753 Introduction for a quick overview of the difference between ordering a crime to be committed and being held liable for failing to prevent your subordinates from committing violations

1. Ordering Offenses

- CB 753-760

2. Superior or Command Responsibility

- **Command Responsibility** CB 781-795, 805 (civilian superiors), 814-819 (through Note 4) (*Čelibići*)
- **Superior Orders as a Defense:** CB 1011-1024 or through 1025 if want to run through the hypos (*Erdemović*)
- **Duress as a Sentencing Mitigation:** CB 1094-1100 (*Erdemović*)

3. Direct and Indirect

- CB 841-846 (the discounted theory of responsibility used at Nuremberg)
- CB 849-866 (Complicity)
- CB 885-901 (Joint Criminal Enterprise)

Class 10 (November 13)

Incitement to Genocide

- CB 959-989 The Radio Cases

Blackboard

- Wilson, “Inciting Genocide with Words” (2015)
- Parker, *Bikindi* (excerpts)

Part IV: Some Second (or Third...) Thoughts

Class 11 (November 20)

Amnesties and Prosecutions

- CB 1066-1082 (*Kallon* and Notes on RSA, Cambodia, IACHR)
- *AZAPO*
- John Dugard, “Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?”
- Mallinder and McEvoy, “Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies”
- Orentlicher, “The Duty to Prosecute”

Class 12 (November 27)

Telling Stories: History, Narrative, and International Criminal Law

1. **Case Study: Eichmann in Jerusalem – Telling History in a Courtroom**
 - Arendt, *Eichmann in Jerusalem*, excerpts
 - Douglas, *The Memory of Judgment*, excerpts
2. **History in a Courtroom**
 - Wilson, *Writing History in International Criminal Trials*, excerpts
 - Gerry Simpson, “Law’s Promise: Punishment, Memory and Dissent” in *Law, War, and Crime*, pp79-104
 - Antje Krog, *Country of My Skull*, excerpts

Class 13 (December 4)

What do we gain or lose through prosecution and punishment?

TBA

Class 14 (December 11)

TBA